

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 16 2006

ROBERT ANTHONY WINTERS,

Petitioner - Appellant,

v.

ANTHONY LAMARQUE, Warden,

Respondent - Appellee.

No. 01-16950

D.C. No. CV-00-05474-LJO

MEMORANDUM^{*}

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Senior Judge, Presiding

Submitted June 16, 2005^{**}
Submission deferred August 15, 2005
Resubmitted March 16, 2006
San Francisco, California

Before: REAVLEY ,^{***} T.G. NELSON, and RAWLINSON, Circuit Judges.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* FED. R. APP. P. 34(a)(2).

^{***} The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Robert Anthony Winters appeals the district court's dismissal of his 28 U.S.C. § 2254 petition as untimely. He argues that the court erred when it concluded that he was not entitled to statutory or equitable tolling. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm.

Winters filed his federal petition a little less than three years after the limitations period expired on April 24, 1997.¹ Eight months of that period, during which California courts were considering filed petitions, must be excluded.² Doing so leaves approximately two years and three months for which Winters must account. He cannot do so adequately.

Winters clearly knew of the factual predicate of his claims in 1995, when he presented his first petition to the state courts. He presented no new claims after his discovery of reports pertaining to his medical and psychological conditions — he merely presented additional evidence. Thus, his argument for statutory tolling under 28 U.S.C. § 2244(d)(1)(D) fails.

¹ See *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001) (explaining that, for prisoners convicted prior to the enactment of 28 U.S.C. § 2244(d), the limitations period prescribed by the statute began to run on April 24, 1996 and therefore expired on April 24, 1997).

² See 28 U.S.C. § 2244(d)(2) (excluding periods during which a petitioner's claims are pending before the state courts).

Winters’ more than two-year delay in filing his claims with the California Supreme Court was too long to consider the claims “pending” under 28 U.S.C. § 2244(d)(2).³ Thus, Winters’ second argument for statutory tolling fails.

We need not address Winters’ argument for equitable tolling because, even if it were successful, it would not account for a sufficient amount of time.⁴

AFFIRMED.

³ *See Evans v. Chavis*, ___ U.S. ___, 126 S. Ct. 846, 854 (2006).

⁴ *See id.*